No. 11729

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN AIR LINES, INC.,

Appellant,

vs.

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

A.

Statement Disclosing Basis on Which It Is Contended That the Circuit Court of Appeals Has Jurisdiction to Review the Order in Question.

The pleadings consist of the following:

1. Judgment confirming arbitration award and the arbitration award. [Tr. pp. 2 to 13, incl.]

2. Petition for Order to Show Cause filed by appellee as assignee of ex-employees of appellant. [Tr. pp. 14 to 25, incl.]

3. Order to Show Cause issued on said Petition. [Tr. p. 26.]

4. Statement of Reasons in Opposition to Order to Show Cause. [Tr. pp. 27 to 29, incl.]

5. Order of Compliance. [Tr. pp. 30 to 31, incl.]

6. Motion for Amendment to Order of Compliance. [Tr. pp. 31 to 33, incl.]

7. Amended Order of Compliance. [Tr. pp. 34 to 35.]

The appeal is taken from the last mentioned order.

The Circuit Court of Appeals has appellate jurisdiction to review said order.

U. S. Code, Title 28, Sec. 225, 28 U. S. C. A. 225;

Rules of Civil Procedure, Rule 73.

The Notice of Appeal is set forth at page 37 of the Transcript.

B.

The Statement of Case and the Questions Involved and the Manner in Which They Are Raised:

1. *Statement of case:*

The appellee, that is, Labor Commissioner of the Division of Labor Law Enforcement, State of California, is the assignee of seven ex-employees of the appellant, Western Air Lines, Inc., and on their behalf appellee claims to be entitled to the benefit of retroactive pay increase granted to employees of appellant retroactively to January 1, 1946, as a result of an award made by a Board of Arbitration acting under and pursuant to the provisions of the Federal Railway Labor Act as amended, which

award was filed July 26, 1946, and confirmed by judgment confirming award on November 21, 1946. The assignors of appellee had all terminated their employment prior to July 26, 1946, and, therefore, were not employees of appellant, Western Air Lines, Inc., on the date the arbitration award was made, nor on the date that it was confirmed. The appellee filed a petition in the District Court for an Order to Show Cause to obtain an order requiring Western Air Lines, Inc., to pay the retroactive wage increase to the appellee as assignee of those ex-employees. This motion was opposed in the District Court, both by written opposition thereto, as shown in the Transcript, page 27, and by oral argument. Notwithstanding the objections thereto, an order was made requiring Western Air Lines, Inc., to pay the amount of the claimed retroactive wage increase to the appellee. The grounds of opposition to the making of this order and

2. *The questions involved on this appeal are as follows:*

a. *The District Court had no jurisdiction* to make the summary order appealed from because the subject matter of the order was not part of the controversy submitted to arbitration. In other words, the Board of Arbitration did not have submitted to it as a question for decision whether ex-employees should be entitled to the benefit of the award or, for that matter, what persons constituted employees. The order confirming the award did not decide anything that had not been submitted to the Board of Arbitration for decision. Hence, there had been no

adjudication on the question on which an Order to Show Cause should issue.

b. *That the controversy is really one as to the application of the arbitration award* and the procedure for such controversy is set up in the Railway Labor Act, Section 8 (m), which provides that such matters are to be referred back to the Board of Arbitration or to a subcommittee thereof for a ruling and, further, the agreement to arbitrate [Tr. pp. 20 and 21, paragraph Fifteen] also so provided; appellee ignored this procedure; and

c. In any event the *assignors of appellee are not entitled to the retroactive pay increase* granted by the arbitration award to employees of appellant because such assignors *were not employees* at the time the arbitration award was made on July 26, 1946.

3. Each of the foregoing questions was raised in the District Court on the Order to Show Cause proceeding by both written objections [Tr. p. 27] and oral objections made at the time of the hearing, and the questions are likewise raised on this appeal and set forth in the statement of points on which appellant intends to rely. [Tr. p 40.]

POINT I.

The Subject Matter of the Order to Show Cause Proceeding Was Outside of the Specific Issues Determined by the Arbitration Award and the Judgment Confirming the Award.

A Petition for an Order to Show Cause is not an independent action and cannot ordinarily be made available to dispose of the merits of a controversy.

19 Ruling Case Law 671;

Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255;

Difani v. Riverside Oil Co., 201 Cal. 210 at 213;

People v. Ah Sam, 41 Cal. 645, 650.

The court must have jurisdiction of the subject matter to confer jurisdiction to make an order on a motion.

Sawyer v. Ellis, 37 Ariz. 443, 295 Pac. 322.

The court's jurisdiction, therefore, to make the order appealed from [Tr. p. 34] was necessarily dependent upon whether it had jurisdiction of the subject matter, which in turn depended upon what questions had been decided by the arbitration award and confirmed by the judgment confirming the award. That judgment merely provided, "that said award be and the same is hereby confirmed." [Tr. p. 13.]

The (Federal) Railway Labor Act, Section 9, subparagraph Second, provides that after an award is acknowledged and filed, it "shall be conclusive on the parties as to the merits and *facts of the controversy submitted to arbitration* * * *." The agreement to arbitrate is set

forth as Exhibit A to the Petition for Order to Show Cause [Tr. pp. 18 to 25, incl.], and under paragraph Fourth thereof it is stated, "the specific questions to be submitted to the Board for decision are as follows: Shown in Appendix A and Appendix B and made a part hereof. Fifth: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it."

If reference is made to Appendix A [Tr. p. 22] and Appendix B [Tr. p. 24], it becomes readily apparent that the question as to who should constitute employees, that is, was an ex-employee entitled to retroactive pay increase or not, was not one of the questions submitted to the Board of Arbitration for decision. Of course, that is the precise question that the District Court purported to determine. In accordance with the provisions of Railway Labor Act above cited, that question had not been adjudicated, there was no decision thereon and it was improper in such a summary proceeding as an Order to Show Cause proceeding for that subject to be determined. Pursuant to the provisions of the Railway Labor Act, Section 9, paragraph Second, the judgment in the District Court confirming the award [Tr. p. 13] did not change nor add to the general rule that a valid arbitration award operates to merge and extinguish all claims embraced in the submission so that thereafter the submission and an award furnish the only basis by which the rights and liabilities of the parties can be determined.

6 C. J. S. 241.

However, an award will not operate to merge and bar any matters except such as were comprehended within the scope of the submission and passed on by the arbitrators.

6 C. J. S. 242.

Roanoke Rapid Power Co. v. Roanoke Nav. etc. Co., 75 S. E. 29, 159 N. C. 393;

Collier v. White, 12 So. 385, 97 Ala. 615.

The scope of the submission or the matters which the arbitrators may decide is determined by the intention of the parties as ascertained from the submission.

6 C. J. S. 221.

"The jurisdiction of the arbitrators cannot be extended beyond the contract of submission by their decision on any jurisdictional question."

Bartlett v. Bartlett, 116 Wisc. 450, 93 N. W. 473.

In his action in the matters submitted to arbitration it is very apparent that the submission was not general but very special or restricted. [Tr. p. 19, paragraphs Fourth and Fifth; Tr. p. 22, Appendix A, "Wages"; Tr. p. 24, Appendix B, "Working Conditions."]

It is the rule where the submission is special or restricted that the award must be limited to the particular matters under submission.

6 C. J. S. 622.

One can look in vain and find nothing in the agreement of submission in this proceeding that states that ex-employees, that is, employees who terminated their employment with Appellant Western Air Lines, Inc., prior to the making of an arbitration award, should be entitled to retroactive pay increase. In other words, the question

of what persons constitute employees was not one of the specific questions submitted to arbitration and was not decided by the Board of Arbitration and hence not confirmed by the order confirming the award. It follows that the order confirming the award could not have adjudicated that question and the District Court therefore lacked jurisdiction to issue an order on an Order to Show Cause proceeding, necessarily based on the order confirming the award, whereby appellant Western Air Lines, Inc., was directed to pay ex-employees of Western Air Lines, Inc., (that is, their assignee, the appellee) retroactive wage increase.

Further, of course, the factual situation giving rise to the question of whether ex-employees were entitled to retroactive pay or not was a factual matter that arose after submission to arbitration. It is the rule that arbitrators cannot include in their award and make decisions on matters arising after the date of submission.

6 C. J. S. 224;
Bell v. McKay and Co., 72 So. 83, 196 Ala. 408.

The scope of the judgment confirming the award must conform to the award.

6 C. J. S. 280;
Cummington Realty Associates v. Whitten, 132 N. E. 53, 239 Mass. 313.

Of course, the Railway Labor Act, Section 9, paragraph Second, the statute under which the judgment confirming the award in question was made, specifically so provides. It follows that the court exceeded its jurisdiction in making the order appealed from, and Western Air Lines, Inc., is entitled to have a trial on the merits of the controversy—this it has not had.

POINT II.

Appellee Followed Wrong Procedure in Using Order to Show Cause Proceeding in the District Court.

It appears that a difference has arisen as to the application of the provisions of the arbitration award. A definite procedure is provided both by the agreement to arbitrate [Tr. p. 20, paragraph Fifteenth], and by the Railway Labor Act, Section 8(m) thereof, which procedure was ignored and was not followed by appellee. The agreement to arbitrate provides "any difference arising as to the meaning or application of the provisions of such award shall be referred for a ruling to the Board or to a subcommittee of the Board agreed to by the parties hereto; and such ruling when certified under the hands of at least a majority of the members of such Board, or if a subcommittee is agreed upon, at least a majority of the members of the subcommittee, and when filed in the same District Clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award."

Railway Labor Act, Section 8(m) uses the same language as above set out. The appellee and appellee's assignors failed to follow the procedure outlined by the Railway Labor Act or as required by their agreement. By reason thereof, appellee followed the wrong course of procedure in the District Court. In view of the agreement and the statute, appellee is estopped and should be held estopped from obtaining relief on the Order to Show Cause. The condition precedent imposed on the assignors of appellee was not complied with.

POINT III.

In Any Event, Only Employees of Western Air Lines, Inc., on July 26, 1946, the Date of the Arbitration Award, Are Entitled to the Benefits of the Award.

The assignors of appellee were not employees of Western Air Lines, Inc., on July 26, 1946, the date the arbitration award was made. [Tr. pp. 15-16.] The obvious purpose of allowing employees retroactive wage increase while an arbitration board is considering the question of wage increase is to keep the employees on the job and to avoid a strike. That is the moving consideration for such retroactive pay increase. Obviously, an employee who quits during that period has eliminated the reason for retroactive pay. By reason thereof, such ex-employees are not entitled to the benefits of retroactive pay fixed by an arbitration award made after the employees have quit. [Tr. p. 28.]

The foregoing point appears to be one of almost first impression; however, it is discussed in the case of *In re Goodyear Tire & Rubber Co.,* Vol. 2, Labor Arbitration Reports 367 at 373. Also reported in Vol. 5, Prentice-Hall Labor Service, paragraph 67242, decided April 3, 1946. The rule appears to be as appellant contends.

Conclusion.

Each of the foregoing points was urged by appellant in the lower court and the Statement of Reasons in Opposition to the Order to Show Cause, filed by appellant in the District Court, and included in the Transcript on Appeal [pages 27 to 29, inclusive], could almost be deemed appellant's brief.

By reason of all of the foregoing it appears that it was error for the District Court to make the Amended Order of Compliance and the order should be reversed.

Respectfully submitted,

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